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No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS, *Respondent.*

On Writ of Certiorari to the
Court of Appeals of Texas, Fourteenth District

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Center for Law and Justice International Supporting Respondent

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Motion of the Center for Law and Justice International as Amicus Curiae in Support of Respondent

Pursuant to Supreme Court Rule 37.4 (b), the Center for Law and Justice International (CLJI) seeks leave to file a brief amicus curiae in support of respondent. In support of its motion, the CLJI states:

1. The CLJI has received consent to file its brief from counsel for the respondent in this case. A copy of that letter of consent is being submitted along with this motion.

2. On February 14, 2003 counsel for the CLJI spoke over the telephone with Ruth E. Harlow, counsel for the Petitioner. Ms. Harlow informed CLJI counsel that they would not consent to the filing of the CLJI amicus brief.

3. As noted more fully in the Interest of Amicus, the CLJI is a lay Catholic legal organization that, among other policy positions, opposes efforts to take public debates on moral issues out of the legislative process by minting new substantive due process rights. The CLJI thus urges the Court to reaffirm its decision in *Bowers v. Hardwick*. Based on an examination of the Petition for Certiorari and the briefs supporting and opposing that petition, CLJI counsel believe that the CLJI's brief brings relevant matter to the Court that is not already before the Court and will be of help to the Court in deciding this case.

WHEREFORE, the CLJI respectfully asks that this Court grant the CLJI leave to file its brief amicus curiae in support of respondent.

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INTEREST OF AMICUS*

The Center for Law and Justice International (CLJI) is a project of Catholics United for Life, a lay Catholic 501 C (3) organization. The CLJI seeks to advance the Catholic perspective on human life and human sexuality issues through litigation, education, and similar activities in accordance with the Magisterium of the Catholic Church.

As a public interest advocacy effort, the CLJI is dedicated to preventing the erosion of traditional moral values via judicial fiat. The CLJI opposes efforts to take public debates on moral issues out of the legislative process through the minting of new rights under the Due Process Clause of the Fourteenth Amendment. Accordingly, the CLJI urges this Court to reaffirm its holding in Bowers v. Hardwick that the Due Process Clause contains no fundamental right to engage in homosexual sodomy.

SUMMARY OF THE ARGUMENT

This Court should deny Petitioners' request that this Court overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986) by locating in the Due Process Clause a broad new right to intimate association and sexual intimacy between consenting adults. Such a right has absolutely no basis in the Constitution's text, or this nation's history or legal tradition. Moreover, such a right would fly in the face of this Court's decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997) which embraced, in its entirety, the approach to substantive

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* This brief is filed upon Motion to the Court. Pursuant to Rule 37.6, amicus CLJI discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

due process analysis set forth in *Bowers*. Of particular significance in *Glucksberg* was the Court's insistence that new liberty interests asserted under the Due Process Clause be described with careful specificity. 521 U.S. at 721. Breezy general descriptions serve only to heighten the risk that the Court's decision will be nothing more than the "policy preferences" of some its Members. *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977).

Similarly, this Court must reject Petitioners' effort to bootstrap a right to sexual intimacy onto substantive due process rights with a historical pedigree, such as marriage. Nothing in this Nation's history or legal tradition supports Petitioners' assertion that all sexual intimacy between consenting adults is morally equivalent, and therefore entitled to the same protection as the marital relationship. To the contrary, this Court's decisions establish that the only sexual relationship that is rooted in this Nation's concept of ordered liberty is marriage. *Loving v. Virginia*, 388 U.S. 1 (1967). The Court's primary concern in *Griswold v. Connecticut*, 381 U.S. 479 (1965) was with protecting the privacy of the marital relationship, not sex qua sex. *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (describing the importance of sexual intimacy to *family life* (not individual gratification)). Within the past two decades, this Court has rejected every effort to bootstrap new substantive due process rights onto existing rights. The Court should not carve an exception in this case.

State laws decriminalizing various sexual relationships and protecting homosexuals from certain kinds of discrimination fall far short of constituting the abiding national consensus required under *Glucksberg*'s approach to substantive due process analysis. Such laws may prove that 1) society, at present, is more tolerant of alternative sexual lifestyles, or 2) criminalizing certain sexual behavior is

unwise social policy. They come nowhere close to establishing that this country regards all sex between consenting adults as worthy of the highest protection under the Constitution. To the contrary, many other laws demonstrate a national consensus that homosexual sodomy, as well as other sexual relationships outside marriage, are inferior and can never attain to the same legal status as marriage.

Finally, and most importantly, overruling *Bowers v. Hardwick* and holding that a right of intimate association including all sexual activities between consenting adults is a fundamental right will eventually wreak havoc on many of the Nation's laws governing marriage. All such laws, including laws against adultery, polygamy, polyandry, and incest become susceptible to the claim that they burden the right to intimate association and thus deserve strict scrutiny. As this Court well knows, very few laws survive strict scrutiny.

If society is in fact moving toward a national consensus about sexual morality, then the foundational principle of collective self-government requires this Court to permit the States to follow their chosen courses. Forcing the States' hands without any basis in Constitutional text or legal history will threaten the Court's legitimacy and undoubtedly cause the same national discord occasioned the last time this Court found a new substantive due process right that was untethered to Constitutional text or national history. *See Roe v. Wade*, 410 U.S. 113 (1973).

ARGUMENT

For at least two decades now, this Court has been leery of "turning any fresh furrows in the 'treacherous field' of substantive due process." *Troxel v. Granville*, 539 U.S. 57, 76 (2000) (Souter, J., concurring). As Justice Powell explained in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977):

> [W]e "have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint.

Id. at 502; *see also Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

Bowers v. Hardwick, 478 U.S. 186 (1986) echoed this Court's historic commitment generally to abstain (with the exception of the abortion cases) from grafting new rights onto the Due Process Clause unless the asserted rights "are so rooted in the traditions and conscience of our people," *Snyder v. Massachussetts*, 291 U.S. 97, 105 (1934) as to be "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Writing for the majority in *Bowers*, Justice White reiterated:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Bowers, 478 U.S. at 194. *Bowers* has been seen as controversial[1] largely because the Court properly declined Mr. Hardwick's invitation to describe the asserted right to

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[1] *See, e.g.*, William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 Vand. L. Rev. 419, 426 (1997) (labeling, with stunning hyperbole, *Bowers* "the most uniformly criticized decision in my lifetime"). The Court's decisions *expanding* substantive Due Process rights, *see, e.g., Roe v. Wade*, 410 U.S. 113 (1973) have, of course, generated far greater national discord than *Bowers* has, and have themselves been the subject of trenchant scholarly criticism. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920 (1973).

homosexual sodomy broadly as a right of privacy or liberty. "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190. An exhaustive survey of state statutes criminalizing sodomy in effect when the Constitution was ratified and when the Fourteenth Amendment was passed produced the Court's conclusion that "[a]gainst this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 194.

I. *BOWERS V. HARDWICK* SHOULD BE REAFFIRMED BECAUSE ITS ENTIRE APPROACH TO SUBSTANTIVE DUE PROCESS ANALYSIS WAS AFFIRMED IN *WASHINGTON V. GLUCKSBERG.*

A. Petitioners' Attempt to Characterize Sodomy as a Right to Intimate Association Flies in the Face of this Court's Insistence in *Glucksberg* that New Rights Asserted Under the Due Process Clause Be Described with Careful Specificity.

This Court resolved any lingering controversy about whether new rights asserted under the Due Process Clause should be defined with careful specificity in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither

> liberty nor justice would exist if they were sacrificed." Second, we have required in substantive due process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause.

Id. at 720-21 (internal citations omitted). Thus, this Court refused to accept the Respondent's characterization of the issue as whether the Due Process Clause provides a right for mentally competent, terminally ill adults to "bring about impending death in a certain, humane and dignified manner." See Brief for Respondents at i, *Washington v. Glucksberg*, 521 U.S. 702. Rather, the issue precisely defined was whether the Due Process Clause "includes a right to commit suicide which includes a right to assistance in doing so." 521 U.S. at 723.

A careful description of the asserted liberty interest is crucial lest the Due Process Clause be transformed into nothing "more than the policy preferences of the members of this Court." *Moore v. City of East Cleveland*, 431 U.S. at 502. *See also Glucksberg*, 521 U.S. at 722 (A careful description of the asserted liberty interest "tends to rein in the subjective elements that are necessarily present in substantive due process review"). Breezy generalities like "the privacy of the home," or the right to make choices "about private, consensual sexual relations," see Pet. Br. at 11, are too broad, and suggest facile conclusions that serve no purpose other than to obscure the real issue. As Professor Michael McConnell has trenchantly observed:

We might be able to agree on highly generalized principles like "human dignity," "fair play," or "equal concern and respect," but how those abstractions will apply to such specific questions as affirmative action, capital punishment, or proper modes of service of process (to name a few examples) is a matter of disagreement among reasonable people. The attraction of natural law is its seemingly universal reasonableness; but specific applications to specific issues lose that quality of universality. When a court announces that the abstract principle of "equal concern and respect" mandates (or precludes) affirmative action, or the principle of personal autonomy mandates (or precludes) assisted suicide, the judge is not in any realistic sense "applying" natural law, but is merely applying his own opinion about affirmative action or assisted suicide. There is no reason the judge's opinion should prevail over that of the people.

Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665, 682-83.

B. Glucksberg Requires Rejection of Petitioners' Attempt to Bootstrap a New Right to Sexual Intimacy Onto Other Fundamental Rights.

This Court repeatedly has rejected efforts to bootstrap new rights to extant fundamental rights on the grounds that there is (allegedly) little difference between them. Most recently in *Glucksberg*, the Court dismissed the argument that there is no constitutionally significant difference

between the fundamental right to refuse medical treatment and the right to assisted suicide:

> The right assumed in Cruzan, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct.

521 U.S. at 725; *see also Reno v. Flores*, 507 U.S. 292, 302 (1993) ("freedom from physical restraint" did not include the right "of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution."); *Michael H. v. Gerald D.*, 491 U.S. 110, 126 (1989) (right to sanctity of family relationships does not translate into a right by a natural father to assert parental rights over a child born into a woman's existing marriage with another man, who raised the child as his own).

In each case, the history and legal traditions behind the asserted right were central to the Court's decisions. *Glucksberg*, 521 U.S. at 711-16; *Reno*, 507 U.S. at 303 ("the

mere novelty of such a claim is reason enough to doubt that substantive due process sustains it"); *Michael H.*, 491 U.S. at 126-27. *See also Jackson v. Rosenbaum*, 260 U.S. 22, 31 (1922) ("If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it").

This Court's reliance on history and tradition is at bottom an act of profound judicial humility that serves the end of collective self-government. For the Court to assert without fairly explicit textual support that the Constitution affords fundamental protections to activities that the people and their elected legislators historically have restricted or even prohibited would negate the people's authority to govern themselves by laws of their own making. As Michael McConnell has pointed out

> When judges base their decisions either on constitutional text or on *longstanding* consensus, they do not usurp the right of the people to self-government, but hold the representatives of the people accountable to the deepest and most fundamental commitments of the people. No single vote, no single electoral victory, no single jurisdiction suffices to establish a tradition: it requires the acquiescence of many different decision makers over a considerable period of time, subject to popular approval or disapproval.

See McConnell, *supra*, 1997 Utah L. Rev. at 682 (emphasis added).

The right to homosexual sodomy, or any sex outside the marital relationship, may implicate choices about

intimate associations, but this Court's substantive due process cases as well as the Nation's legal traditions and current legal practices establish that the marital relationship has always been regarded "as quite distinct," *id.*, from other sexual relationships. Thus, Petitioners' extensive reliance on *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) is unavailing.

In *Griswold*, the Court was concerned not with protecting sex qua sex, but with the privacy of the marital relationship. The Court saw marriage as a "noble" institution, "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." 381 U.S. at 486. The Connecticut law forbidding the use of contraceptives

> seeks to achieve its goals by means having a maximum destructive impact upon [the marital] relationship.... Would we allow the police to search the sacred precincts of *marital* bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the *marriage* relationship."

Id. at 485-86 (emphasis added).[2]

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[2] Petitioners also quote language from *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) in arguing that sexual relations between two consenting adults is a constitutional right: "Sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'" Pet. Br. at 12 (quoting Slaton, 413 U. S. at 63). *Slaton* offers no support for Petitioners' insinuation that the Court adopted their "anything goes between two consenting adults" approach to sexual morality as a governing constitutional standard. *Slaton* emphasizes first of all that this Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965) was concerned with protecting sexual intimacy within the marital

Eisenstadt lends no more support to Petitioners' argument than does *Griswald*. First, of all the case involved an Equal Protection Clause challenge, 405 U.S. at 446,[3] but even more importantly the case is properly understood as supporting the right to decide whether to bear children, not a right to consensual adult sex. In response to the state's assertion that the law was intended to discourage sexual immorality, the Court did not say that the state's purpose was illegitimate. Rather, the Court held that the law did not serve the asserted purpose. *Id.* at 448.

C. There Is No Stable, Enduring National Consensus That A Right to Engage In Homosexual Conduct Is "Implicit In the Nation's Concept of Ordered Liberty.

While attitudes toward sexual morality, including homosexuality have undoubtedly grown more tolerant in the past two decades, it would be a gross overstatement to say that the nation has reached a stable and abiding consensus that the right to homosexual sodomy is implicit in the nation's concept of ordered liberty. Thirteen states still criminalize consensual sodomy.[4] Many states deny

relationship. 413 U.S. at 65. Second, *Slaton* rejected the very premise underlying Petitioners' argument, which is that the term 'sexual morality' is oxymoronic, at least between consenting adults. *See id.* at 60 (quoting a sociologist who opined that the viewing of obscene pornography with its emphasis on "abnormal and distorted" sexual practices can have a deleterious effect on the mental health of the individual).

[3] The Court expressly stated it was not addressing the question whether the law violated a fundamental right under the Due Process Clause. 405 U.S. at 447 n.7

[4] Ala. Code § 13A-6-65(a)(3) (2002); Fla. Stat. § 800.02 (2002); Idaho Code § 18-6605 (2002); Kan. Stat. Ann. § 21-3505 (2002); La. Rev. Stat. Ann. § 14:89 (2002); Miss. Code Ann. § 97-29-59 (2002); Mo. Rev. Stat. § 566.090 (2002); N.C. Gen. Stat. § 14-177 (2002); Okla. Stat. tit. 21, §

homosexual couples the ability to adopt children. *See, e.g.*, Ex Parte J.M.F., 730 So. 2d 1190 (Ala. 1998).[5] No state confers a marriage license on homosexual couples, and efforts to persuade the nation that homosexual intimate relationships must be treated equally with heterosexual marriage have been overwhelmingly repudiated. *See, e.g.*, Alaska Const. art. I, § 25 (2002); Hawaii Const. Art. I, § 23 (2002); Neb. Const. Art. I, § 29 (2002).[6]

886 (2002); S.C. Code Ann. § 16-15-120 (2002); Tex. Penal Code Ann. § 21.06 (Vernon 2002); Utah Code Ann. § 76-5-403 (2002); Va. Code Ann. § 18.2-361 (Michie 2002).

[5] According to the Lambda Legal Defense Funds website, more than half of all states do not permit homosexual couples to adopt children. *See* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?

[6] *See also* Ala. Code § 30-1-19 (2002); Alaska Stat. § 25.05.013 (Michie 2002); Ariz. Rev. Stat. § 25-101 (2002); Ark. Code Ann. § 9-11-109 (2002); Cal. Fam. Code § 308.5 (Deering 2003); Col. Rev. Stat. 14-2-104 (2002); Del. Code Ann tit. 13, § 101 (2002); Fla. Stat. Ann. § 741.212 (West 2002); Ga. Code Ann. § 19-3-3.1 (2002); Haw. Rev. Stat. § 572-1 (2002); Idaho Code § 32-201 (Michie 2002); 750 Ill. Comp. Stat. 5/213.1 (2003); Ind. Code Ann. § 31-11-1-1 (Michie 2002); Iowa Code § 595.2 (2002); Kan. Stat. Ann. § 23-101 (2001); Ky. Rev. Stat. Ann. §§ 402.005 & 402.020 (Michie 2002); La. Civ. Code Ann. art. 89 & 3520 (West 2003); Me. Rev. Stat. Ann. tit. 19-A, § 701 (2001); Md. Code Ann., Fam. Law § 2-201 (2002); Mich. Comp. Laws § 551.1 (2002); Minn. Stat. § 517.03 (2002); Miss. Code Ann. § 93-1-1 (2002); Mo. Rev. Stat. § 451.022 (2002); Mont. Code Ann. § 40-1-401 (2002); Nev. Rev. Stat. 122.020 (2002); N.H. Rev. Stat. Ann. §§ 457:1 & 457:2 (2002); N.C. Gen. Stat. § 51-1.2 (2002); N.D. Cent. Code § 14-03-01 (2002); Okla. Stat. tit. 43, § 3.1 (2003); 23 Pa. Cons. Stat. § 1704 (2002); S.C. Code Ann. § 20-1-15 (2002); S.D. Codified Laws § 25-1-1 (Michie 2002); Tenn. Code Ann. § 36-3-113 (2002); Utah Code Ann. § 30-1-2 (2003); Vt. Stat. Ann. tit. 15, § 8 (2002); Va. Code Ann. § 20-45.2 (2002); Wash. Rev. Code § 26.04.010 (2002); Wis. Stat. § 765.001 (2002); Wyo. Stat. Ann. § 20-1-101 (Michie 2002).

In 1996, the federal government passed The Defense of Marriage Act, which reflects a national policy judgment that the marital relationship is to be preserved as a union between "one man and one woman," not available to homosexual couples, or for that matter, any other relationships. 1 U.S.C. § 7 (2000). The United States Military forbids open homosexual relationships among members of the armed services. *See* The National Defense Authorization Act, 10 U.S.C. § 654 (1993). There is obviously no enduring national consensus about the legitimacy of homosexual relationships.

In any event, the trend toward more tolerance of homosexual relationships cuts against Petitioners' argument that this Court now must force the States' hands. The current pace of change counsels against the draconian step of overruling a prior decision and declaring sexual intimacy between consenting adults a new fundamental right. The Court's last attempt to constitutionalize its view of what direction the Country's morals ought to take, in *Roe v. Wade*, has resulted in a quarter century (and continuing) of profound national discord over the issue. Justice Ginsburg's observations about the political climate surrounding *Roe v. Wade* now serve as a warning:

> the political process was moving, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.

Ruth Bader Ginsburg, *Some Thoughts on Autonomy & Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 385-86 (1985).

II. A DECISION TO REVERSE *BOWERS V. HARDWICK* WOULD INVALIDATE MANY LAWS REGULATING MARRIAGE AND FAMILY RELATIONS IN THIS COUNTRY.

A broadly-defined new fundamental right for consenting adults to engage in any and all sexual activities, would have profound legal implications for every law touching upon sexual relationships. Despite Petitioners' assurances to the contrary,[7] there is no principled means of drawing the line between homosexual sodomy and adultery, polygamy, or incest, as long as the participants are consenting adults. Other sexual relationships outside marriage have no better historical pedigree than homosexual sodomy. *See generally* Morris Ploscowe, *Sex and the Law* 142 (1951); John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 22 (1988). Even swinging clubs or ménage a trois would be a part of this new fundamental right, since such practices are just one more permutation of the right to intimate association.

Certainly, the first casualty of such a broadly defined right would be the invalidation of state laws proscribing both sodomy and fornication. Even now, despite widespread

[7] Petitioners blandly assert that bigamy and incest laws are not threatened because they serve state interests in protecting the marriage contract, as well as persons, such as children, who cannot truly consent to sex. Pet. Br. at 17. Of course, these interests evaporate if the parties to the marriage consent to mutual adultery, or in the case of incest, the parties are adults who can freely consent.

social acceptance of unmarried cohabitation, thirteen states and the District of Columbia still criminalize fornication.[8]

Laws proscribing incest would be constitutionally suspect as applied to consenting adults. Aunt Bea has a constitutional right to sexual intimacy with Andy, because "control over one's body is fundamentally at stake in sexual relations, involving as they do the most intimate physical interactions conceivable." See Pet. Br. at 10.

Far more significant, however, would be the eventual effect of such a right on this Country's laws regulating the institution of marriage. If sexual intimacy with the partner(s) of one's choice is a fundamental right, certainly, the decision to end an intimate association is central to that choice. Thus, divorce laws become subject to strict scrutiny. Indeed, Kenneth Karst, applying a supposed right to "intimate association" concluded in 1980 that a constitutional right to no-fault divorce exists. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L. J. 624, 637-38, 671-72 (1980); *see also* David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 Marq. L. Rev.

[8] D.C. Code Ann. § 22-1602 (2002); Fla. Stat. § 798.02 (2002) (criminalizing lewd and lascivious cohabitation of unmarried individuals); Ga. Code Ann. § 16-6-18 (2002); Idaho Code § 18-6603 (2002); 720 Ill. Comp. Stat. 5/11-8(2002) (criminalizing fornication if open and notorious); Mass. Gen. Laws ch. 272, § 18 (2002); Mich. Comp. Laws § 750.335 (2002) (criminalizing lewd and lascivious cohabitation of unmarried people); Minn. Stat. § 609.34 (2002); Miss. Code Ann. § 97-29-1 (2002) (criminalizing habitual fornication); N.C. Gen. Stat. § 14-184 (2002) (criminalizing fornication when lewd and lascivious cohabitation occurs); N.D. Cent. Code § 12.1-20-10 (2002) (criminalizing open and notorious cohabitation of unmarried people); S.C. Code Ann. § 16-15-60 (2002) (criminalizing fornication when cohabitation or habitual intercourse are present); Utah Code Ann. § 76-7-104 (2002); Va. Code Ann. § 18.2-344 (Michie 2002); W. Va. Code § 61-8-3 (2002).

975, 984 (1992) (discussing Karst's theory of intimate association).

Similarly, laws against adultery are threatened. Nearly half of the states still criminalize adultery.[9] Such laws would arguably "burden" Fred's and Wilma's constitutional right to sexual intimacy with Barney and Betty, individually or all together. Provided they are all consenting adults who derive "emotional enrichment," Pet. Br. at 10., from the liaisons, their right to engage in such conduct becomes unassailable under Petitioners' understanding of substantive due process.

Even the validity of bigamy laws would become doubtful. Polygamy (and polyandry) laws are based primarily on the moral belief that the marriage union between one man and woman is uniquely special and should be protected. *See Reynolds v. United States*, 98 U.S. 145, 164 (1898) (polygamy historically has been viewed as "odious" throughout Christendom). If all sexual intimacy between consenting adults is a fundamental right under the Due Process Clause, then state law classifications that

[9] Ala. Code § 13A-13-2 (2002); Ariz. Rev. Stat. § 13-1408 (2002); Colo. Rev. Stat. § 18-6-501 (2002); D.C. Code Ann. § 22-201 (2002); Fla. Stat. § 798.01 (2002) (criminalizing open adultery); Ga. Code Ann. § 16-6-19 (2002); Idaho Code §18-6601 (2002); 720 Ill. Comp. Stat. 5/11-7 (2002) (criminalizing adultery if open and notorious); Kan. Stat. Ann. § 21-3507 (2002); Md. Code Ann., Criminal Law § 10-501 (2002); Mass. Gen. Laws ch. 272, § 14 (2002); Mich. Comp. Laws § 750.30 (2002); Minn. Stat. § 609.36 (2002); Miss. Code Ann. § 97-29-1 (2002) (criminalizing habitual adultery); N.H. Rev. Stat. Ann. § 654:3 (2002); N.Y. Penal Law § 255.17 (Consol. 2002); N.C. Gen. Stat. § 14-184 (2002) (criminalizing adultery when lewd and lascivious cohabitation occurs); N.D. Cent. Code § 12.1-20-09 (2002); Okla. Stat. tit. 21, § 871 (2002); R.I. Gen. Laws § 11-6-2 (2002); S.C. Code Ann. § 16-15-60 (2002) (criminalizing adultery when cohabitation or habitual intercourse are present); Utah Code Ann. § 76-7-103 (2002); Va. Code Ann. § 18.2-365 (Michie 2002); W. Va. Code § 61-8-3 (2002).

burden this right, such as laws restricting marriage to one man and one woman, would become subject to strict scrutiny. In other words, if marriage is merely a contract cementing an individual's choice of an intimate associate, and all such choices are protected under the Due Process Clause, then why should the contract be limited to two parties, if the persons involved believe that their needs for intimate association are better met with three or four parties to the contract?

As with monogamy, so with marriage generally. The decision to marry is a fundamental right, *Loving v. Virginia*, 388 U.S. 1 (1968) and if homosexuals have a fundamental right to intimate sexual association, then upon what basis can they be denied the right to marry. Laws prohibiting homosexual marriage draw classifications that "burden" a fundamental right to sexual intimacy among consenting adults. Ergo, such laws would be presumptively invalid.

Petitioners' proposed right of intimate association could well have devastating effects on the institution of marriage over time. Such changes as same-sex marriage and homosexual families "will not be confined to adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear." Joseph Raz, The Morality of Freedom 162 (1986) (quoted in Gerard V. Bradley, Pluralistic Perfectionism: A Review of Making Men Moral, 71 Notre Dame L. Rev. 671, 695 (1996)).[10] Bradley explained further:

[10] Bradley notes that Raz "ventured no moral evaluation of the prospect" that homosexual families would become accepted in our law and culture. *See* 71 Notre Dame L. Rev. at 695.

> Why not just call or treat gay relationships as "marriage" in scare quotes or with an asterisk? Because for a time straight and gay marriage might co-exist in the law and in popular consciousness as somehow superior and inferior forms. But they will not for long. Sooner rather than later, persons will wonder, superior and inferior versions of what? The ranking presumes a common metric or a genre embracing both species. If the genre is the traditional one, gay partnerships are not inferior versions of it at all, but morally indistinguishable from what the tradition has always considered an affront against marriage: cohabitation. If marriage and gay partnership are variations on a single theme, some new ideal of domestic partnership has replaced marriage, one which has conclusively cut off our understanding of marriage as, in some decisive way, a community grounded in the complementarity of reproductive functioning.

Bradley, 71 Notre Dame L. Rev. at 695-96.

Thus, as Professor Robert George notes, "the presence or absence of a culture's commitment to, and support for, a social form such as monogamous marriage will profoundly shape the options that people will typically understand themselves to have – and the choices that they will actually make – in morally important areas of their lives." Robert P. George, Making Men Moral 165, 166 (1993). In other words, the surrounding culture, including that culture's legal norms, helps to shape people's understanding of what are or are not truly valuable forms of life and relationships. At a time when many States are

looking for ways to shore up the institution of marriage,[11] an unfettered right to "intimate association" would be devastating.

If society wishes to make changes in laws governing sexual relationships, it should do so consciously after full debate and not by dictate of a few judges who have been convinced by lawyers that there is no significant difference between the various kinds of sexual relationships in which consenting adults may participate.

[11] *See, e.g.*, Sharon Tubb, *When Government Wants Marriage Reform*, ST PETERSBURG TIMES, at 1D (February 8, 2003) (discussing ways, such as covenant marriage laws, that governments are attempting to combat societal ills associated with the breakdown of the institution of marriage).

CONCLUSION

It is one thing to say that criminal laws prohibiting sexual practices are unwise social policy because they entail unseemly police behavior. *See Romer v. Evans*, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting). It is a quantum leap, however, to say that such sexual practices should be deemed a fundamental right that is deeply embedded in the Nation's history and traditions. The only sexual relationship with such a pedigree is the marital relationship.

For the foregoing reasons, this Court should reaffirm its holding in *Bowers v. Hardwick* that homosexual sodomy is not a fundamental right under the Due Process Clause of the Fourteenth Amendment.

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